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No. 07-1223

In The Supreme Court of the United States

EDWARD NATHANIEL BELL,

Petitioner,

v.

LORETTA K. KELLY, WARDEN,
Sussex I State Prison,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF RESPONDENT

ROBERT F. MCDONNELL
Attorney General of Virginia

JERRY P. SLONAKER
Senior Assistant Attorney General

KATHERINE B. BURNETT
Senior Assistant Attorney General
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804)786-9642
(804)786-0142 (fax)

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Bell claimed in state court that his trial counsel were constitutionally ineffective at sentencing for not investigating and presenting certain friends and family, and he presented affidavits of the witnesses supporting his claim. The state habeas court adjudicated Bell's claim on the merits: it assumed the truth of Bell's allegations, found that he failed to demonstrate either unreasonable performance or prejudice, and dismissed the claim on the pleadings. Bell presented the same claim to the district court along with some new allegations of facts about his own background that trial counsel allegedly failed to investigate. The district court announced that Bell had not failed to develop his claim in state court and held an evidentiary hearing at which Bell presented some of his witnesses. The district court then found that counsel's performance had been unreasonable, but denied relief on the strength of its independent finding that Bell failed to demonstrate prejudice. The Fourth Circuit expressly declined to address the performance issue and it too found that Bell failed to demonstrate prejudice. Given these circumstances:

> Did the Fourth Circuit err when it additionally applied the deferential standard of 28 U.S.C. § 2254(d) to Bell's claim that was (1) predicated on petitioner's factual allegations which the state court assumed were true and "adjudicated on the merits," and (2) supplemented by additional evidence permitted to be heard in an evidentiary hearing in the district court?

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STATEMENT OF THE CASE

This is not the case the petitioner makes it out to be. The petitioner overstates his claim and omits critical details. In some instances, he mischaracterizes the evidence, proceedings, and rulings below. Perhaps most critically, in his Question Presented, petitioner says that "the state court refused to consider" his evidence. Yet Edward Bell never has identified even one piece of evidence which the state court refused to consider.[1] The record demonstrates that the state court thoroughly considered every claim, allegation of fact, and evidentiary exhibit the petitioner chose to present. The dismissal on the pleadings *assumed all of Bell's factual allegations to be true*.

I. The Murder.

In 1999, Jamaican immigrants dominated the illegal drug-dealing scene in the small city of Winchester, Virginia. (JA 646).[2] Bell was a 35-year-old

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[1] Amicus Virginia Association of Criminal Defense Lawyers (VACDL) recognizes that the record does not support Bell's factual assertion in his Question Presented, as shown by its careful rewording of their own Question Presented to state that the case involves evidence "which the state court did not have before it and did not consider."

[2] References to the Joint Appendix filed in this Court are denoted "(JA ___)." References to Bell's Appendix filed with this certiorari petition are denoted "(CApp. ___)." References to the Joint Appendix filed in the Virginia Supreme Court on direct appeal are denoted "(VJA ___)." References to the Joint

(Continued on following page)

Jamaican national, living in Winchester. (JA 160). He was a sporadically-employed (JA 169-71), known drug dealer (VJA 1758) who had been convicted of carrying a concealed, semi-automatic weapon. (VJA 1703, 1724). Based on that conviction, the United States Immigration and Naturalization Services ("INS") had started deportation proceedings (VJA 1707), and also was considering the effect of the weapons conviction on Bell's application for United States citizenship. (VJA 1725).

Ricky Timbrook was a 32-year-old Winchester Police Sergeant. (VJA 3408). Officer Timbrook voluntarily joined the Special Enforcement Team ("SET") that worked in high-crime areas of the city (VJA 3033), taught in-service training for police, self-defense skills at the local women's shelter (VJA 3031), and spoke at local schools about the dangers of drugs. (VJA 1683). He worked in the Community Oriented Probation and Parole Services ("COPS") with parolees in high-crime areas. (VJA 1687). Officer Timbrook was a devoted family-man, and admired by his colleagues for his impeccable honesty and integrity. (VJA 3019). He was happily married and awaiting the birth of his first child. (JA 130-33).

Late on the night of October 29, 1999, Officer Timbrook and a parole officer were working together in the COPS program, driving a police vehicle

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Appendix filed in the Fourth Circuit are denoted "(4JA ___)." Other references to the record are self-explanatory.

and dressed in clothing identifying them as law-enforcement officers with SET. (VJA 1896). They saw two men standing in a dark alley in a high-crime area. One man started running as the officers parked their vehicle. Officer Timbrook immediately gave chase to the fleeing suspect, repeatedly yelling, "Stop! Police!" (CApp. 185a). Officer Timbrook, in excellent physical shape (VJA 1684), closely pursued the suspect. (VJA 1975).

The brief chase ended when the fleeing suspect stopped, turned and shot the officer at close range in his face. Officer Timbrook had not unholstered his service gun the entire time. (VJA 2093). The officers who found Timbrook moments later rushed him to the Emergency Room, but he was pronounced dead a short time later. (VJA 2394).

An extensive search of the area that night for the shooter was unsuccessful. (CApp. 185a). The next morning, officers found Bell hiding in a coal bin in the basement of a house he had broken into near the shooting. (CApp. 186a). He wore clothing seen on the fleeing suspect. (VJA 1824, 1873, 2062, 2257, 2283). He had gunshot residue on his hands (CApp. 186a), and $1800 worth of cocaine in his pocket (VJA 2513). The police found a .38-caliber revolver stashed outside the basement window. Forensic evidence established that the gun was the murder weapon (VJA 2313, 2418) and that it contained a DNA profile

which did not exclude Bell.[3] (VJA 2450-2451). Bell also had a key to a car (VJA 2506) in which police found bullets of the same type which killed Officer Timbrook. (VJA 2344). Police recovered an empty box of the same ammunition in Bell's home. (VJA 2350-2365).

While in jail, Bell confessed to another inmate that he had killed Timbrook because the officer was "out to get him." (VJA 2533).

During the subsequent capital murder trial, *see* Virginia Code § 18.2-31(6) (the premeditated killing of a police officer is capital murder), the jury learned that Bell was an armed drug-dealer (VJA 1758, 1821, 1823, 1836, 1839) who harbored personal animosity against Officer Timbrook. Officer Timbrook arrested Bell, both for the concealed weapons offense (VJA 1695-1696, 3288), and on the INS deportation warrant. (VJA 1696-1697). Officer Timbrook responded to at least one report of domestic violence against Bell. (VJA 1749). Bell repeatedly preached that someone should kill Officer Timbrook by shooting him in his head because Bell believed the

[3] The Commonwealth's DNA expert extracted DNA from perspiration on the handle and trigger of the gun. PCR testing showed a mixture of three or more contributors that included the DNA profiles of Bell and the firearms examiner who had handled the gun after arrest. Officer Timbrook was not a contributor. Due to the complexity of the mixture, the expert could not calculate statistical probabilities relating to the observed profiles. (VJA 2449-53).

officer wore a bullet-proof vest. (VJA 1768). Billie Swartz testified that Bell practiced target shooting with her, was a good shot, and that he threatened to kill Billie if she testified against him. (JA 73-76).

INS scheduled a hearing for November 5, 1999, to decide whether Bell's naturalization application should be denied, and Bell had personal notice of that upcoming event. (VJA 1726, 3322). On October 29, 1999, when Bell ran from Officer Timbrook with a gun and cocaine on his person, he knew that proceedings likely to result in his deportation were imminent.

II. The Trial and Appeal.

The trial judge appointed two attorneys to represent Bell: Lloyd Snook, an experienced capital case defense attorney (VJA 801), and another attorney who had to withdraw due to a conflict of interest. (JA 629). The judge appointed Jud Fischel, another experienced capital case defense attorney (JA 626-29) to join Snook. Snook subsequently asked to withdraw after discovering that the "mitigation specialist" he had hired had done no work on the case. (4JA 2042-46; VJA 801-02). The trial judge granted a lengthy continuance (VJA 798-99) and appointed Mark Williams, another experienced defense attorney. Fischel specifically asked for Williams to be appointed even though this was Williams' first capital trial because Fischel knew him to be a good defense attorney in serious felony cases,

and also knew that Williams worked as a social worker for several years prior to becoming a lawyer. (JA 634-35). Fischel knew that Williams' experience would be beneficial in finding and assessing mitigating evidence. (VJA 802-03). Neither Fischel nor Williams wanted a "mitigation specialist" – an investigator without professional credentials – because they were not impressed by the ones they had seen, and believed Williams' background, along with their court-appointed expert, Dr. Stejskal, better satisfied the need for such assistance. (JA 656-57, 677, 732).

Dr. Stejskal is a well-known forensic psychologist with the University of Virginia's Institute of Law, Psychiatry and Public Policy (ILPP). (JA 639-40). Stejskal held himself out as a mitigation expert who would perform a "comprehensive" evaluation of Bell's "personal history and character, as well as his mental condition." (JA 257-58). ILPP advertised that its clinical faculty assists attorneys "in the development of mitigation," including the "development of comprehensive psycho-social summary/narrative based upon extensive and multi-source research and interviews encompassing the life history of a defendant." (4JA 1743). Stejskal prepared an exhaustive report of his "comprehensive understanding" of Bell, "based in a broad range of information and evaluation procedures." (JA 258). He detailed numerous family interviews, including Bell's

sister Nellie who lived in Jamaica, and extensive testing. (JA 257-79).[4]

Stejskal found that no neuropsychological or intellectual testing could be relied upon because Bell lied extensively to "fake bad" on test instruments. (JA 263-66, 277). He ruled out mental illness. (JA 262). Stejskal told counsel that Bell was of "average criminal intelligence," with an IQ in the upper 70's to mid 80's. (JA 139, 428). He advised trial counsel that Virginia's statutory mitigating factors relating to mental condition, *see* Virginia Code § 19.2-264.4, were not present in Bell's case. (JA 267).

Bell's counsel decided against using Stejskal as a sentencing witness based on Stejskal's explicit recommendation. Stejskal said the evidence he would be required to testify about was "double-edged." (JA 277-78). Among other things, Bell's family told Stejskal that Bell was a spoiled "mama's boy" who always got his way and that he fell in with the wrong crowd when he emigrated to the United States. (JA 269-70, 273). Bell told Stejskal a version of the shooting circumstances that did not conform to the evidence. (JA 266, 277-78).

In addition to Dr. Stejskal, trial counsel talked to their client, his sisters in Winchester, at least one of Bell's ex-girlfriends, the grandmother of three of

[4] Neither Dr. Stejskal, trial counsel, nor Bell's habeas legal team ever has located school, medical, or other background records. (JA 260, 642-43).

Bell's five children, and Bell's mother and father. (JA 725, 727-29). Bell and his family reported that there was no abuse, mental illness or neglect in Bell's background. (JA 728).

Counsel knew Bell's criminal history and the fact that he had abandoned his pregnant wife in Jamaica, moved here and fathered four more children by two other women out of wedlock, and had assaulted his girlfriends. (JA 167, 729-31). They knew he did not provide child support for these children. (JA 737). They consulted with Professor Roger Groot at the Washington & Lee Capital Case Clearinghouse, and discussed with him possible strategies for the guilt and penalty phases. (JA 651-52).

Bell denied guilt and trial counsel mounted a vigorous defense. Counsel believed that, if the Winchester jury found him guilty, it would show no mercy in sentencing. (JA 695). Counsel believed that weak evidence about, and from, Bell's various ex-girlfriends, ex-wife, and children was potentially harmful. The prosecutor would argue, for example, that Ricky Timbrook never had the chance to see his only child. (JA 736-38). They strongly believed that they risked insulting the jury to present a "show him mercy due to his background" defense at sentencing after fighting the guilt phase "to the hilt." (JA 644).

On January 25, 2001, the jury found Bell guilty of the capital murder. It also found him guilty of the use of a firearm in the commission of murder, possession of a firearm while in possession of cocaine

and possession of cocaine with the intent to distribute. (VJA 2769).

In addition to the aggravating evidence of the circumstances of the crime itself which had been presented in the guilt phase, at sentencing the Commonwealth presented Bell's criminal history, including convictions for carrying a concealed weapon, fleeing an officer, reckless driving, driving on a suspended license, and giving false information. (JA 157; VJA 3451-78). Two West Virginia State Troopers testified about incidents involving Bell: on one occasion, Bell ran from the officer and was found hiding in a field after a massive search; in another, Bell possessed .38-caliber ammunition. Two jailors testified that Bell had threatened them. A Jamaican police officer testified that Bell had been convicted in Jamaica for assault and destruction of property at the age of 21.[5] (JA 81-106).

Billie Swartz detailed a horrifying sexual and physical assault on her by Bell. (JA 106-12). Dawn

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[5] Bell faulted trial counsel for not finding and presenting to the jury evidence that the Jamaican conviction for assault involved "merely" a fight in which Bell tore the victim's shirt. However, trial counsel's cross-examination *at trial* of the Jamaican officer revealed exactly that. (JA 105-06). Bell faulted trial counsel for not finding and presenting to the jury evidence that Bell's nickname in Jamaica was "Slow" or "Nattyslow." However, that same Jamaican officer testified that Bell's nickname in Jamaica was "Slow." (JA 102). Moreover, trial counsel knew that Bell's nickname in Winchester was "Fast Eddie," a fact they kept from the jury. (JA 660).

Jones and Patrick Morrison described an argument in which Bell brandished a gun. (JA 115-18). Witnesses testified that they bought their illegal drugs from Bell. (JA 113-14). Another officer described stopping Bell and finding an illegal, concealed .38-caliber handgun. (JA 119).

Officer Timbrook's father, mother, and sister testified. (JA 120-29). His young widow, pregnant with the couple's first child at the time of the murder, read a lengthy victim-impact statement describing the devastating effect that her husband's murder had had on her, and would have on her young son. (JA 129-33).

Counsel's planned strategy for the penalty phase was to (1) present evidence of secure prison conditions Bell would encounter serving a life sentence (JA 655), (2) befriend the Timbrook family in hopes of persuading them against wanting a death sentence (JA 653), (3) obtain mitigating evidence from Dr. Stejskal (JA 653), and (4) present the testimony of Nellie Hutchinson, petitioner's sister in Jamaica who was the only sibling then sympathetic to Bell's situation. (JA 649-50). The strategy did not succeed: the trial court held prison-condition evidence inadmissible under Virginia law (JA 655); the Timbrook family favored a death sentence for Bell (JA 653); Dr. Stejskal found nothing helpful and what evidence he did find was potentially harmful (JA 653); and Nellie died shortly before trial. (JA 649-50).

Bell's counsel knew the Commonwealth's evidence and appropriately cross-examined the Commonwealth's witnesses. (JA 718). They presented Bell's father and sister briefly to show the jury that Bell had a family who would be affected by the jury's sentence. (JA 134-39). Counsel argued to the jury that Bell would not be a danger to anyone in a maximum security prison, imprisonment for life would be harsh, any doubt about guilt should resolve in a life sentence, and Bell's execution would not bring back Officer Timbrook, but only would cause more pain by affecting Bell's innocent family. (JA 143-48).

The jury sentenced Bell to death, finding that he would continue to be a serious danger, *see* Virginia Code § 19.2-264.4, and to prison terms for the other crimes. On June 7, 2002, the Virginia Supreme Court unanimously affirmed, *Bell v. Commonwealth*, 563 S.E.2d 695 (Va. 2002) (CApp. 181a), and on January 13, 2003, this Court denied certiorari. *Bell v. Virginia*, 537 U.S. 1123 (2003).

III. State Habeas Corpus Review.

On November 13, 2002, pursuant to Virginia Code § 19.2-163.7, the state court appointed two capital-qualified lawyers to represent Bell in state habeas corpus proceedings.[6] Bell also had his own

[6] Virginia appoints habeas counsel as soon as the direct appeal is concluded in order to give them at least 120 days of

(Continued on following page)

investigator who was a lawyer. Habeas counsel filed a petition for a writ of habeas corpus in the Virginia Supreme Court on April 21, 2003, primarily making *Brady*[7] claims and alleging that Bell was mentally retarded.

Bell's third claim was an ineffective assistance of counsel claim alleging that trial counsel failed to investigate mitigating evidence. (JA 211). Bell argued that his sister and father had not turned out to be good witnesses, and counsel's closing argument did not discuss Bell's life or good qualities, ask for a life sentence, or discuss the fact that Bell would be ineligible for parole.[8] He alleged that counsel did not find and present the following evidence:

- Bell was the tenth of twelve children[9] and his father and mother had children by various other men and women;
- his father and mother were absent much of the time due to work and his sister Nellie raised him;
- he grew up in a small town in Jamaica on family land surrounded by family;

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preparation time before the state habeas petition must be filed. *See* Va. Code § 8.01-654.1.

[7] *Brady v. Maryland*, 373 U.S. 83 (1963).

[8] The trial court instructed the jury that Bell would be ineligible for parole on a life sentence. (4JA 67).

[9] This was in fact presented to the jury through Bell's sister, Marjorie. (JA 134).

- his family attended church seven days a week and sang in the church choir;
- relatives gave him alcohol and marijuana from an early age;
- he married Barbara in Jamaica;
- his mother came to the United States first and Bell came in 1992;
- Barbara gave birth to a daughter after Bell left;
- he was kind to Barbara and to his daughter and sent her gifts;
- he worked in the United States for his father and for various employers;
- he had four other children here by two women (which he alleged was normal behavior for a Jamaican);
- Dawn Jones gave birth to a child and Bell stayed by her side when she was ill;
- Tracey Nicholson gave birth to three children and she thought Bell was a good father;
- Joanne Nicholson (Tracey's mother) thought Bell was a good father; and
- Tracey and Joanne did not see Bell assault Billie Swartz and believed Bell never had been violent.

(JA 215-21). Bell presented the state court with a number of exhibits:

- 3/10/03 affidavit from his ex-wife, Barbara (JA 186);
- 3/6/03 affidavit from his ex-girlfriend, Tracey Nicholson (JA 188);
- 3/13/03 affidavit from his father (JA 207);
- 3/6/03 affidavit from Joanne Nicholson (JA 190)[10];
- undated affidavit from his ex-girlfriend, Dawn Jones (JA 193);
- 3/5/03 affidavit from juror Greer, who said she would have liked to have had more information about Bell (4JA 1246);
- 4/19/03 affidavit from Dr. Stejskal, who said his testing yielded "mixed results" and he did not know Bell did not graduate from school, was nicknamed "Nattyslow," or had trouble keeping a job (4JA 1744);
- 3/11/03 affidavit from Dorothy Downer, taken in Jamaica, who said Bell was friendly but slow (JA 209);
- 3/12/03 affidavits from trial counsel Fischel and Williams, who provided little

[10] The affidavits of Tracey and Joanne Nicholson and Bell's father stated that trial counsel had, in fact, interviewed them.

to no information regarding their mitigation investigation and strategy (JA 198, 203); and

- 3/12/03 affidavit from Marie Deans, the "mitigation specialist" who was hired by Snook but who did no work on the case (JA 195).

Bell moved the state habeas court to provide him discovery, but his requests related solely to his *Brady* claims. (Motions dated 5/8/03 and 1/15/04 filed in the Virginia Supreme Court, Rec. No. 030539).[11] In a conclusory motion, Bell asked for $ 15,000 to pay an unidentified "mitigation specialist." (Motion dated 6/24/03, Rec. No. 030539). As the Warden pointed out in opposition, Bell already had the services of two court-appointed habeas lawyers *and* his own investigator/attorney. (Opposition dated 6/30/03, Rec. No. 030539). The Virginia Supreme Court denied these motions. (Orders dated 6/23/03 and 4/29/04).

Except for the routine prayer at the end of his petition asking for an evidentiary hearing on all claims (See Bell's "Corrected Petition" dated 4/21/03, Rec. No. 030539, at page 47), Bell made no specific request for an evidentiary hearing on his inadequate

[11] The first discovery motion also contained one brief paragraph asking for money to send his investigator to Jamaica to interview witnesses for his retardation and inadequate mitigation investigation claims, without justification or argument.

mitigation claim, and certainly no argument as to why a hearing was necessary on that claim.

On April 29, 2004, the Virginia Supreme Court granted the Warden's motion to dismiss Bell's petition. The court's decision *assumed the truth* of all of Bell's factual allegations of ineffective mitigation investigation and dismissed the claim, applying *Strickland v. Washington*, 466 U.S. 558 (1984), and *Wiggins v. Smith*, 539 U.S. 510 (2003), to the facts Bell alleged. (JA 228-31). It found that Bell demonstrated neither deficient performance of counsel nor *Strickland* prejudice. (JA 231). It found that the allegations in the Nicholsons' affidavits regarding Swartz's trial testimony, and the Nicholsons' assertion that Bell never was violent, presented cross-purpose evidence which, if presented at trial, would have opened the door to damaging rebuttal evidence of police reports which showed that Tracey Nicholson made domestic violence charges against Bell. (JA 167, 231).[12]

Bell filed a petition for rehearing dated May 28, 2004, a motion to supplement his petition for rehearing dated June 17, 2004, and also something he called an "Amendment to Habeas Corpus Petition" dated August 18, 2004, but none of those filings

[12] The Virginia Supreme Court found Bell's claim of retardation "frivolous" and that he, in fact, is not mentally retarded. (4JA 314-15). It further found that the allegations regarding trial counsel's closing argument were refuted by the record. (4JA 316).

related to his claim of inadequate mitigation investigation. The court denied those motions in orders dated September 2 and November 17, 2004. On December 2, 2004, the trial court set Bell's execution date for January 7, 2005.

On February 15, 2005, Bell filed a certiorari petition in this Court in which he argued that the Virginia Supreme Court's collateral review unconstitutionally denied him an evidentiary hearing, discovery, and experts on his *Brady* and retardation habeas claims. He asserted no right to a hearing, discovery or experts on his inadequate mitigation investigation claim. On April 18, 2005, this Court denied certiorari review. *Bell v. True*, 544 U.S. 985 (2005).

IV. Federal Habeas Corpus Review

On December 23, 2004, the United States District Court for the Western District of Virginia stayed Bell's execution and appointed federal habeas counsel. Without the assistance of any court-appointed investigators or experts, Bell filed a habeas corpus petition alleging that trial counsel were ineffective in their investigation of mitigating evidence:

- trial counsel had no option under the Constitution *not* to present mitigating evidence;
- the prosecutor argued at sentencing that there was no mitigation presented;

- counsel failed to obtain background records on Bell, to investigate abuse, learning disabilities, substance abuse, and retardation;
- counsel did not interview Bell's ex-wife, in-laws and an ex-girlfriend;
- counsel did not hire a "mitigation specialist;"
- evidence was available showing mental retardation and maybe "organic brain damage;"
- counsel did not give Dr. Stejskal unidentified records and information;
- an aunt would have testified that Bell was slow;
- an expert on post-traumatic stress disorder could have explained that Bell learned to run from the police by his experiences witnessing crimes in Jamaica;
- Bell's ex-wife could have testified that Bell was a loving father, had mental limitations and was nicknamed "Nattyslow;"
- Tracey Nicholson could have testified about Bell's non-violence and disputed Swartz's testimony;
- Joanne Nicholson could have testified that Bell was non-violent, was a good father and disputed Swartz's testimony;

- Dawn Jones could have testified that Bell was a good father and Bell stayed by her side during illness;
- Bell's infant children could have testified that they loved him;
- Rosa Starks-Cadet could have testified that she knew Bell to be non-violent;
- trial counsel knew that Enos Davenport could have testified that Bell was polite to the jailor who testified at trial that Bell threatened him;
- Aretta Terry could have testified that she never saw Bell use cocaine;
- Bell had no prior incarcerations for violent crimes;
- the two family witnesses counsel put on the stand were ineffectual;
- counsel's closing argument was sub-standard; and
- juror Greer's affidavit proved prejudice.

(JA 582-600). Bell presented the same state habeas affidavits from the following persons:

- both trial counsel;
- Marie Deans;
- his ex-wife;
- the Nicholsons; and
- Dawn Jones.

(JA 582-600). Without court-appointed experts or discovery, Bell presented the district court with the following new exhibits:

- greeting cards sent to Bell from his children and family in 2000 (JA 233-49);
- 8/18/00 unnotarized "statement" from Enos Davenport (JA 250);
- 5/11/05 affidavit from Aretta Terry saying Bell did not use cocaine (Bell's Exhibit No. 43 attached to his § 2254 petition in the district court);
- 5/12/05 affidavit from Swartz saying she told the truth at trial about the assault (JA 252);
- 5/12/05 affidavit from Starks-Cadet saying Bell was non-violent (JA 255); and
- 5/12/05 affidavit from Dr. Stejskal stating that he disagreed with the Virginia Supreme Court's definition of retardation and would have wanted to know that Bell was nicknamed "Nattyslow," did not graduate, and could not keep a job. (Bell's Exhibit No. 50 attached to his § 2254 petition in the district court).

On June 16, 2005, the Warden filed a Rule 5 Answer and Motion to Dismiss the petition, arguing that § 2254(d) required deference to the state court's decision and § 2254(e) permitted no hearing. She

argued that Bell's claim was defaulted because Bell never presented the state court with his new affidavits and allegations.

In response, Bell asserted as follows:

> The substance of Bell's claims was presented to the Virginia Supreme Court. . . . Any evidence presented in Bell's federal habeas brief only supplements and clarifies the state court records, *but does not fundamentally alter the legal claim considered by the Virginia Supreme Court*. . . .
>
> In his federal habeas brief, Bell makes the *same claim* again. . . . The crux of the argument is *exactly the same*. . . . Bell supplements his federal habeas petition with more examples of what might have been found, but *the same fundamental claim remains just as it was presented to the Virginia Supreme Court*. . . .

(Bell's 8/1/05 Brief in Opposition to Warden's Answer and Motion to Dismiss at 117-18) (Emphases added). The district court concluded on February 7, 2006, that, because Bell's new factual allegations were "not critical" to its decision, it would not rule on the Warden's default argument. *Bell v. True*, 413 F. Supp. 2d 657, 698 n.17 (W.D. Va. 2006) (CApp. 82a).

The district court entered the following order:

> I find Bell has presented a colorable claim that the Supreme Court of Virginia's decision denying this claim was an unreasonable

> determination of the facts in light of the evidence before it and an unreasonable application of the *Strickland, Williams, Wiggins,* and *Rompilla* line of Supreme Court precedent. *See* § 2254(d). However, I will refrain from making a final ruling on this issue until an evidentiary hearing is held and the relevant issues are developed more fully.

(CApp. 83a-84a). Without any explanation or discussion, the district court announced:

> Because Bell diligently developed the factual basis of this claim in state court, an evidentiary hearing is not barred by § 2254(e)(2). Bell's allegations of trial counsel's insufficient investigation and overlooked mitigation evidence constitute "facts that, if true, would entitle him to relief," *McCarver v. Lee,* 221 F.3d 583, 598 (4th Cir. 2000), and it appears from the record that "the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing." *Townsend v. Sain,* 372 U.S. 293, 313 (1963). Thus, I find that Bell is entitled to a hearing on this claim.

Id. The district court granted Bell's request for an investigator for the hearing, but denied his motion for a "mitigation specialist." (4JA 979-80).

Shortly before the hearing, trial counsel for the first time agreed to talk to the Warden's counsel and for the first time provided the Warden with Dr.

Stejskal's mitigation evaluation report prepared before trial for defense counsel. (JA 280). Based upon that report (JA 257) and the affidavit of trial counsel Fischel and Williams (JA 280), the Warden filed on June 13, 2006, a motion for summary judgment, arguing that the uncontradicted record demonstrated that the state court's judgment must receive the deference mandated by § 2254(d).[13]

Dr. Stejskal's pre-trial report was a comprehensive evaluation of Bell's background, character and mental condition (JA 257-58), detailed multiple interviews of Bell and his family (sisters Marjorie, Diane, and Norlene in Winchester, sister Nellie in Jamaica, and Tracey Nicholson) (JA 258-59), and referenced extensive testing. Dr. Stejskal provided a thorough description of Bell's personal history:

- Bell was the tenth of twelve children and his father and mother had children by various other men and women;
- his father and mother were absent much of the time due to work and his sister Nellie raised him;
- he grew up in a small town in Jamaica on family land surrounded by family;

[13] The district court denied summary judgment after the subsequent hearing. (4JA 1270).

- his family attended church seven days a week and sang in the church choir;
- Bell used alcohol and marijuana heavily and his relatives gave him these drugs from an early age;
- he married Barbara in Jamaica;
- his mother emigrated here first and Bell emigrated here in 1992;
- Barbara gave birth to a daughter after Bell left;
- Bell sent his daughter gifts;
- he worked in the United States for his father and then for various employers;
- he fell in with the wrong crowd and had four other children here by two women;
- there were incidents of violence against Dawn Jones;
- there were incidents of violence against Tracey Nicholson;
- Officer Timbrook tried to break up a fight between Tracey and Bell on one occasion;
- Tracey said Bell was a good father even though he provided no child support; and
- his sister Nellie died suddenly in December, 2000.

(JA 268-76).

At the two-day hearing, Bell presented the testimony of:

- Carmeta Albarus, a "mitigation specialist" allowed to testify to her portrayal of Bell's life, over the objection of the Warden (JA 488);
- Craig Cooley, a lawyer presented as an expert *legal* witness over the Warden's objection, who admitted he knew nothing about Bell's case and testified generally about what he does in his capital cases (JA 401);
- Dr. Stejskal, who acknowledged his 12-page, single-spaced, pre-trial report, but disavowed any role as the mitigation expert he described himself to be in the report (JA 438);[14]
- Barbara Williams said Bell left her when she was pregnant, but wrote their daughter letters and sent her gifts (JA 591);
- Carol Anderson, Barbara's sister who said Bell lived with her and did household chores (JA 601);

[14] Bell's trial counsel were "flabbergasted" at Dr. Stejskal's habeas disavowal of the excellent work he actually had performed. (JA 648). The district court inexplicably found "it was unreasonable to depend upon Dr. Stejskal to do an investigation of the nature required." (JA 802).

- Dawn Jones said Bell helped her with medical problems when their daughter was born, was upset by his mother's medical problems, used physical violence against her 3 or 4 times and brandished a gun during an argument (JA 540-53);
- Joanne Nicholson said Bell was a "very nice" person and that Billie Swartz's trial testimony about the assault was a lie (JA 562, 564);
- Precious Henderson, a co-worker at one of Bell's jobs who said Bell was "pretty good to get along with," but who did not know Bell had been fired for falsifying a drug-screen test (JA 585, 171); and
- Marie Deans, the trial-level "mitigation specialist" who caused trial attorney Snook to have to withdraw because she did no work on the case (JA 484).

Bell was not at the hearing and did not testify. His legal team presented no evidence from Tracey Nicholson, Enos Davenport, Aretta Terry, Billie Swartz, Rosa Starks-Cadet or Bell's children. The district court held inadmissible the many "affidavits" Ms. Albarus said she had procured in Jamaica from alleged character witnesses, as well as Ms. Albarus' lengthy "report" detailing her hearsay version of Bell's life. (JA 802-03).[15]

[15] Ms. Albarus was a social worker who was criticized for taking credit for another's work in *State v. DiFrisco*, 804 A.2d

(Continued on following page)

The Warden presented Bell's trial attorneys, Fischel and Williams, to explain the circumstances of the case, their efforts to defend Bell and the strategies they employed. (JA 626-757). Counsel explained in great detail the "whole context about this case that made mitigation itself very difficult." (JA 643-47). Bell presented one witness in rebuttal: Dr. Cunningham, a psychologist, who testified over the Warden's objection as to his opinion of how trial attorneys should try cases. (JA 759).[16] The district

507, 549-50 (N.J. 2002). (JA 519-20). According to her, Bell enjoyed a wonderful life in Jamaica and was loving to Barbara before he moved to the United States. She said Bell was nicknamed "Slow" in Jamaica but admitted this could be because he was considered lazy. (JA 504). She admitted that Bell was not considered retarded in Jamaica. (JA 506). She admitted that Bell had not been abused or neglected by anyone, and that his father provided well for the family. (JA 525-26). Dawn Jones told Ms. Albarus that Bell had beaten her. (JA 533). Bell's sisters told Ms. Albarus that Bell was a "mama's boy," Bell was not abused physically or sexually, and Bell's father provided well for the family. (JA 525-26). Ms. Albarus said she found two law enforcement witnesses in Jamaica to say Bell really liked police officers, but admitted she never told them that Bell had threatened to kill sheriff's deputies, dealt drugs, and murdered a police officer. She conceded if those facts were true, then Bell was a different person than she had been led to believe. (JA 533-35). Ms. Albarus charged Bell's habeas counsel at least $20,000 (JA 533), an amount it was undisputed that the trial court never would have authorized for mitigation services at the time Bell was tried. (JA 719, 733).

[16] Bell did not offer into evidence Dr. Cunningham's pre-hearing report, although he now relies upon information in that document which was not considered by the district court. (Bell's Brief at 3, 14, 15, 47, 50, 52).

court did not credit Ms. Albarus, Dr. Cunningham, Mr. Cooley, or Ms. Dean.

At the conclusion of the hearing, the district court announced its ruling from the bench, deeming trial counsel's performance professionally unreasonable in not finding and using Barbara Williams, Dawn Jones, Carol Anderson, Joanne Nicholson, and, of "lesser importance," Precious Henderson. (JA 799-800). The court, however, found that Bell had failed to prove he was prejudiced. (JA 803-04). The district court's ruling was made without any reference to the Virginia Supreme Court's judgment, to § 2254(d)'s requirement of a reasonableness determination, or to its own pre-hearing ruling stating that it would refrain from making any decision on the reasonableness of the state court's decision until after the hearing.

In the Court of Appeals, Bell presented no argument that his federal claim was "new" and thus had not been "adjudicated on the merits in State court" under § 2254. He emphasized that "the district court was unhindered by the strictures of the AEDPA [the Antiterrorism and Effective Death Penalty Act of 1996]" because the district court had allowed him an evidentiary hearing; not because he had argued, or the court had found, that his claim was "new." (Bell's 7/13/07 opening CTA4 Brief at 38). Bell's argument was a straightforward merits complaint that the district court should have found prejudice.

He did not argue that the district court erroneously applied § 2254(d) or deferred to the state court. As was obvious from the record and to the parties who appeared in the district court and heard that court's oral decision, the district court in fact adjudicated Bell's claim *de novo* on its merits. Indeed, the Warden argued to the Fourth Circuit that, while the district court's ultimate judgment finding no prejudice was correct, it nevertheless should be upheld on different grounds because the district court had *erred in holding an evidentiary hearing and in finding independently* that Bell's trial counsel's performance had been professionally unreasonable. The Warden argued that § 2254(d) required dismissal of the claim.

The Fourth Circuit issued an unpublished decision denying relief on January 4, 2008. *Bell v. Kelly*, No. 06-22, 2008 U.S. App. LEXIS 125 (4th Cir. 2008) (CApp. 17a). The court expressly declined to rule on the issue of whether an evidentiary hearing properly had been authorized, "[b]ecause we find that counsel's performance did not prejudice Bell." (CApp. 11a-12a). The court expressly refrained from addressing the reasonableness of counsel's performance under the first part of the *Strickland* test because Bell had not demonstrated prejudice. (CApp. 14a). The Fourth Circuit ruled that the

Virginia Supreme Court reasonably found no prejudice under § 2254(d). (CApp. 14a-17a).[17]

On January 18, 2008, Bell filed a petition for rehearing, complaining that the Fourth Circuit should not have applied § 2254(d) and for the first time asserting that he was allowed to develop new evidence to support his claim. He did not assert that his claim was a "new" claim. (Bell's 1/18/08 Petition For Rehearing at 3-4). On January 29, 2008, the Fourth Circuit denied Bell's petition for rehearing with no judge of the court requesting a poll on Bell's petition for rehearing *en banc*. (CApp. 178a).

On February 14, 2008, the state trial court scheduled Bell's execution for April 8, 2008. In his petition for a writ of certiorari, Bell argued that § 2254(d) should not apply to his claim because he was allowed to develop *additional evidence* on that same claim, not because it was a *new* claim. (Pet. Cert. 21: "By strictly applying § 2254(d)'s unreasonable-application standard *to a claim of prejudice heavily predicated on evidence newly received* on federal habeas. . . ."). (Emphasis added). After the Governor reprieved Bell's execution date, this Court, on May 12, 2008, stayed Bell's execution

[17] In a footnote, the court ruled that, because the district court had mentioned § 2254(d)'s deference standard in its pre-hearing order, the district court implicitly must have employed that standard at the conclusion of the hearing (CApp. 12a), the record and the parties' understanding to the contrary notwithstanding. (JA 797-804).

and granted certiorari on his Question 1. *Bell v. Kelly*, 128 S. Ct. 2108 (2008).

SUMMARY OF ARGUMENT

Bell's arguments that his federal claim of inadequate mitigation investigation was "new" and thus outside the purview of 28 U.S.C. § 2254, and that the Constitution requires state habeas corpus courts to hold evidentiary hearings on such claims, were not presented below or encompassed in the grant of certiorari. They therefore should not be considered.

Bell's state court claim remained substantially the same, factually and legally, in federal court. It was not "new" such that § 2254(d) would not apply. The only error in this case was the district court's permitting an unauthorized hearing and then second-guessing the state court on the *Strickland* performance prong. The Fourth Circuit's consideration of Bell's evidence and independent determination of no prejudice rendered its additional application of § 2254(d) superfluous.

Section 2254 presents an orderly, easily-understood, decisional framework for federal courts to apply when reviewing state court criminal judgments. Congress intended to expedite implementation of state court decisions which are not constitutionally unreasonable, recognize and codify the role of the state courts as co-equal to the federal

courts, and replace the *Townsend v. Sain*, 372 U.S. 293 (1963), standard of reviewing the "fairness" of the state court *process* (and intrusive, duplicative federal court hearings) with a more workable standard of reviewing the state court *decision* to see if it lies outside all constitutional parameters. The language of § 2254(d) and (e) plainly and unambiguously prohibits federal court hearings unless the state court decision was unreasonable.

All of the evidence supporting Bell's federal court claim was within Bell's own knowledge and possession. Thus, Bell cannot have "diligently developed" in state court his later-augmented, federal court evidence such that he merited the narrow statutory exception allowing for a federal hearing. The ultimate decision, finding just as the state court had found, that Bell's weak mitigation would have made no difference, only highlighted the waste of judicial resources expended in a duplicative federal hearing. All judges to consider Bell's case have agreed that his alleged mitigation was weak and made no difference in his case.

ARGUMENT

28 U.S.C. § 2254 Does Not Permit *De Novo* Review Of Bell's Claim.

Bell asks this Court to indulge the fiction of calling his federal claim a "new" claim. This is the foundation upon which he builds his entire argument.

Only by this fiction can Bell mount any argument to escape the mandate of § 2254(d). Fiction is necessary to escape the error committed by the district court in holding an evidentiary hearing in the first place. Without the fiction, the only issue in Bell's case with respect to his inadequate mitigation investigation claim is whether the state court's decision was unreasonable. On that point, the result is not even close: all eleven judges who have looked at Bell's claim – including the district court judge who never should have allowed a hearing – agree that Bell has not shown prejudice. Consequently, the state court's decision cannot have been unreasonable. Bell's proposal, that this Court accept his fiction and rewrite § 2254 to include a "new claim" exception, is necessary for him to obtain a reversal of the Fourth Circuit's judgment. This argument is contrary to the record, the statute, and the intent of Congress. It would mark a sea change in federal habeas corpus to the certain detriment of principles of federalism.

1. Bell's "new claim" proposal was not presented below and also is contrary to what he argued below.

Bell argues that the Fourth Circuit erred in applying 28 U.S.C. § 2254(d)'s standard of deference to his claim of inadequate mitigation investigation because the claim allegedly was not, as required in the opening sentence of § 2254(d), "adjudicated on the merits in State court." He posits that § 2254(d) means that, whenever an inmate adds "significantly new

evidence" to an ineffective assistance claim which he first adjudicated in state court, the claim mutates into an entirely "new" claim of constitutional error in federal court, free from the constraints of § 2254(d).

Bell expressly argued in the district court that his federal claim did *not* "fundamentally alter the legal claim considered by the Virginia Supreme Court" and that it was, in fact, "exactly the same" claim. (Bell's 8/1/05 Brief in Opposition to Warden's Answer and Motion to Dismiss at 117-18). Bell certainly did not back away from that position in the Fourth Circuit. There he presented a straightforward merits argument, simply disagreeing with the district court's independent merits determination of no prejudice, and noting, as the record certainly showed, that the district court believed it was "unhindered" by § 2254(d). (Bell's 7/13/07 Opening Brief, CTA4 at 38).

After the Fourth Circuit found no prejudice, and upheld the reasonableness of the state court's decision under § 2254(d), Bell argued for rehearing, asserting that the Fourth Circuit should not have applied § 2254(d) to his claim because it had declined to do so in *Monroe v. Angelone*, 323 F.3d 286 (4th Cir. 2003). In *Monroe*, the Fourth Circuit concluded that *Brady* violations had been newly-discovered in the federal habeas proceeding. 323 F.3d at 297-98. Still, Bell did not make the "new claim" argument which he presses now.

The Fourth Circuit had no opportunity even to consider Bell's current argument. This Court should

not entertain it as grounds for possible reversal of the judgment below. *See, e.g., Yee v. Escondido*, 503 U.S. 519, 533 (1992) (refusing to address claims not raised below); *Carlson v. Green*, 446 U.S. 14, 17 (1980) (Court does not normally decide issues not presented below). Furthermore, his new proposal is not encompassed in the question upon which the Court granted certiorari and, for that additional reason, should not be considered. *See* U.S. Sup. Ct. Rule 14(1)(a); *Yee*, 503 U.S. at 535-38.

2. Neither Bell's claim nor the facts to support it were "new."

a. Bell's claim was not "new."

The Warden does not dispute that *de novo* review in a § 2254 action might be authorized on issues which were properly preserved in the state court but, through no fault of the inmate, were not adjudicated by the state court. *See Wiggins*, 539 U.S. at 534 (federal court free to decide *Strickland* prejudice *de novo* because state court never reached the issue).[18] Neither does the Warden dispute that *de novo* review in a § 2254 action might be authorized on claims which the inmate did not present to the state court, or which were presented but found defaulted, if the inmate can prove "cause and prejudice" or "actual

[18] Of course, subsidiary fact-finding by the state court still must be presumed correct under § 2254(e)(1). *See Bradshaw v. Ritchey*, 546 U.S. 74, 79-80 (2005) (federal court required to apply § 2254(e)(1) presumption of correctness).

innocence" to overcome the default. *See Michael Williams v. Taylor*, 529 U.S. 420, 444 (2000) (sufficient "cause" to overcome default of new federal court claims of juror bias and prosecutorial misconduct); *House v. Bell*, 547 U.S. 518, 522 (2006) ("actual innocence" overcomes default).

Bell's claim which was addressed by the district court, however, fit none of these scenarios because it was not "new" or different from the claim he presented to the Virginia Supreme Court, as Bell explicitly admitted in the district court. *See also* CApp. 82a (district court expressly declining to consider Bell's factual allegations newly made in federal court, albeit without deciding whether defaulted). When the district court decided to hold an evidentiary hearing, it was looking at *the identical* record considered by the Virginia Supreme Court and the claims were the same.

Then, at the hearing, the district court permitted Bell to expand his allegations to include testimony from witnesses Bell had chosen not to present to the state court: Carmeta Albarus; Craig Cooley; Carol Anderson; Precious Henderson; and Dr. Cunningham. Of these, only Anderson and Henderson were fact witnesses, testifying that Bell was helpful around the house (JA 601) and "pretty good to get along with" at work. (JA 585). Bell's choice to add these known but previously unasserted items of "mitigation" allegedly not investigated did not automatically *transform* the nature of his asserted constitutional violation.

Bell relies heavily on *Michael Williams* for the proposition that a hearing and *de novo* review are required for claims which really are newly made in federal court.[19] But Bell's ineffective assistance claim is fundamentally different from the *Michael Williams* prosecutorial misconduct and juror bias claims. Those claims were completely new in federal court and rested on evidence that Williams could not have known in state court. A *Strickland* claim of ineffective mitigation investigation is never in any sense a claim involving misconduct by a prosecutor or state official.

In juror or prosecutorial misconduct cases, forces outside the inmate's control can prevent the petitioner from being able to know about certain facts underlying his claim and, upon a proper showing of "cause," *de novo* review of the new matters is authorized. This Court found in *Michael Williams* that Congress never intended § 2254(e)(2)'s "failed to develop" language to insulate from federal court review a claim for which the prosecutor concealed facts. *Michael Williams*, 529 U.S. at 434-35. Claims of inadequate mitigation investigation, on the other

[19] Bell relies on *Price v. Vincent*, 538 U.S. 634 (2003), but there the Court found error in the federal court's *de novo* review of the same claim determined by the state court. He also relies on *Gonzalez v. Crosby*, 545 U.S. 524 (2005), but there the Court was determining whether a claim fit within F.R.C.P. 60(b), not § 2254(d). Bell's further reliance on *Vasquez v. Hillary*, 474 U.S. 254 (1986), a pre-AEDPA case, cannot help him because there the Court found that the petitioner's claim was the same claim in federal and state court.

hand, and especially ones involving the defendant's own background, entail facts known by the defendant, and sometimes known exclusively by the defendant as occurred in this case. The rule in *Michael Williams* cannot be construed so broadly as to constitute a rule of automatic amendment of *Strickland* ineffective assistance claims that would eviscerate the carefully balanced approach Congress intended in § 2254(d).

If this Court were to hold that Bell's federal claim is entitled to *de novo* review because it is a different claim from the one he presented to the state court, then there is no limit to "new" claims subject to *de novo* review in federal court. Virtually every inmate alleging ineffective assistance of counsel could meet the test *because it is almost always possible to find an uninterviewed witness or unread document*. *See Wiggins,* 539 U.S. at 533 ("*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case").

Bell's vague, amorphous "significant new evidence" standard is no standard at all. It would throw the federal courts into perpetual uncertainty about a claim while trying to sort out the "new" claims from the often augmented or re-formed ones routinely made by capital and non-capital § 2254 petitioners, both *pro se* and counseled. Indeed, it is the very prospect of getting a second bite of the

collateral review apple – habeas corpus standing alone in allowing for *two separate, co-equal court systems* to review the same matter – that even now encourages unsuccessful petitioners in state court to change how they present their same claims in federal court, or to withhold claims or supporting facts from the state courts.

Many inmates attempt to improve the presentation of their claims to the federal court instead of relying only on the same arguments and supporting factual allegations they used unsuccessfully in state court. The rule of *de novo* review Bell proposes at the very least would send mixed signals to the lower federal courts about when procedural default rules, hearings and *de novo* review should be applied to such new matters. But about Bell's claim there should be no confusion: it is the paradigmatic example of a claim that Congress intended would be reviewed with deference in federal collateral proceedings.

b. Virtually all of Bell's facts were not "new."

A comparison of Bell's evidence presented in state and federal court shows on its face that Bell did not present a "new claim." (*Compare lists above, pages* 14-15 *to* 19-20, 25). And Bell utterly fails in his attempt to identify "new" evidence. (Bell's Brief at 39-51).

He says that he presented new evidence from four witnesses to the federal court that he was not

violent. (Bell's Brief at 43). Ms. Albarus testified that the witnesses to the Jamaican assault offense told her that the incident involved a "scuffle" in which Bell tore the victim's shirt. (JA 513). This was not new: trial counsel knew it and brought it out on cross-examination of the police officer. (JA 105-06).[20]

Ms. Henderson, the witness the district court found "of lesser importance" than the other witnesses (JA 800), said she worked with Bell and never saw him with a gun or being violent or selling drugs. (JA 584). This evidence was not new: Bell presented to the state habeas court affidavits from two witnesses who said Bell was not violent and did not carry a gun. (JA 188, 190-91).

Barbara Williams, Bell's ex-wife, testified at the federal hearing that murder was not in character for Bell. (JA 593). This witness was not new: Bell presented her affidavit to the state habeas court which assumed her allegations to be true. (JA 186). It was Bell's choice as to *what* he wanted to include in her affidavit to the state court.

Ms. Anderson, Bell's ex-wife's sister, testified at the hearing that Bell was not violent, did not carry a gun or get into fights or hold animosity towards police

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[20] Ms. Albarus' hearsay accounts would not have been admissible in a Virginia sentencing hearing. *See Wright v. Commonwealth*, 427 S.E.2d 379, 392 (Va. 1993), *vacated on other grounds*, 512 U.S. 1217 (1994); *Buchanan v. Commonwealth*, 384 S.E.2d 757, 773 (Va. 1989), *cert. denied*, 493 U.S. 1063 (1990).

officers in Jamaica before he emigrated here. (JA 603). Again, this was not new: the state habeas court considered Bell's affidavits from similar witnesses saying he was not violent, the only difference being that those state court witnesses spoke of his more relevant behavior *in the United States*. (JA 188, 190-91).

Bell relies on four witnesses who testified in federal court that Bell liked police officers. This evidence would be laughable were it not so offensive in this case in which overwhelming evidence established that Bell shot an officer he hated in the face because he thought the officer wore a bullet-proof vest. Ms. Albarus presented inadmissible hearsay stating that a police officer in Jamaica, *who was Bell's own niece*, "did not indicate" any problems with Bell. (JA 513-14). Bell did not present this evidence to the state court.

Joanne Nicholson testified that she never saw Bell threaten a police officer, and his ex-wife, Barbara, testified that Bell had police officer friends before he moved here. (JA 578, 588-89). With the exception of Albarus, Bell *did* present affidavits from these very same witnesses to the state court. (JA 186, 190). Again, it was Bell's choice as to *what* testimony he wished to present through them to the state court. Lastly, Bell relies on the testimony of Ms. Anderson that Bell had no animosity towards police officers in Jamaica (JA 603), evidence Bell inexcusably chose not to present to the state court.

Bell also relies on the unnotarized "statement" from Enos Davenport disputing Officer Robinson's own sworn testimony at trial that Bell threatened him. (JA 250). Davenport's "statement" certainly is not "new;" it is dated August 18, 2000, *before the trial itself*. Bell chose not to present this "statement" to the state court, *see Michael Williams*, 529 U.S. at 437-38 (prisoner's fault in not presenting full facts to the state court prohibits federal evidentiary hearing), and also chose not to present Davenport as a live witness at the federal hearing. Bell's deliberately untested, unpresented evidence certainly cannot be considered "new."

Finally, Bell tries to recast as "new" the same evidence from Joanne Nicholson and Dawn Jones that he presented in state court, simply because it was *live* testimony, more "vibrantly" presented than when the same words were *read* by the state court. (Bell's Brief at 44). Quite obviously, evidence from witnesses in a habeas hearing, held years after a death sentence has been imposed, is not assessed for its "vibrancy," but rather for the establishment of facts which trial counsel supposedly did not find. When a court has presumed alleged facts to be true, there is nothing further to be established. Bell was in a better position in state court with his allegations accepted as true than he was in federal court with a burden to prove them true.

Bell concedes, as he must, that his allegation of abuse "was less extreme than the abuse at issue in *Terry Williams*, *Wiggins*, and *Rompilla*." (Bell's Brief

at 47-48).[21] The factual assertions which underlay the claim of "abuse" were not "new" even to trial counsel: Bell's sisters told Dr. Stejskal that they were whipped for wrong-doing and Bell told Dr. Stejskal that he got the worst of it. (JA 269-70, 422). Dr. Stejskal reported this to trial counsel. (JA 269-70).

Bell now alleges that he was beaten with belts, cords and other instruments, and deprived of food (Bell's Brief at 47), but he obviously knew this all along. However, Bell tendered *none of that evidence* at the hearing in which he was required to prove his claims. Instead, in this Court, he relies on a hearsay "report" prepared by Dr. Cunningham *that never was admitted into evidence in any court or subjected to*

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[21] Williams had a "nightmarish" childhood of horrific abuse and neglect, his parents had been imprisoned for the neglect, Williams was sent to live under social services protection, and he was "borderline retarded." *Terry Williams v. Taylor*, 529 U.S. 362, 395-96 (2000). Wiggins was severely physically abused and molested repeatedly by his mother and a series of foster parents. *Wiggins*, 539 U.S. at 517. Rompilla's parents were violent alcoholics who beat him, locked him in a dog pen, and deprived him of living essentials, and he suffered from brain damage and extreme mental disturbance. *Rompilla v. Beard*, 545 U.S. 374, 392 (2005). By contrast, witnesses told Ms. Albarus and Dr. Stejskal that the Bell children got whippings for being lazy and not doing chores, and Bell's own sisters claimed that Bell was the favored only son and a "Mama's boy" who got the best treatment. (JA 269-70). Bell's sisters also said that their parents provided well for the family and that the whippings were not "abuse," but rather expected discipline. (JA 269). Finally, Bell and his sisters, when asked by trial counsel about physical or sexual abuse, denied both. (JA 726).

evidentiary testing. (Bell's Brief at 47, citing JA 307, 323, 326). That evidence simply was no part of the claim Bell presented in any of the courts below. It certainly should not be considered for the very first time in the highest Court in the land.

Bell also points to Dr. Stejskal's testimony that "there was [*sic*] questions of . . . abuse he experienced at the hands of his father," but that brief mention was merely an acknowledgement of what Dr. Stejskal already had relayed to trial counsel before trial. (JA 422, 269-70). Lastly, Bell relies on Ms. Albarus' hearsay testimony that Bell was beaten. (JA 505). However, even Ms. Albarus had to admit that the word "beat" was not used by her informants; Bell was "disciplined" when he was lazy. (JA 505). Ms. Albarus admitted that there was no "abuse" in the Bell household as that term is understood in her field of social work. (JA 525).

Bell next says that "new" evidence of his "good" character was presented in the federal court hearing by way of four witnesses and greeting cards sent to him by his children. (Bell's Brief at 48-49). Bell neglects to mention that he never attempted to offer the greeting cards into evidence in his § 2254 case and that, as a result of his failure of proof, they form no part of the claim decided below. They are not new as shown by their pre-trial and during-trial dates. (JA 236-480).

Bell's federal habeas witnesses consisted of his ex-wife Barbara, Barbara's sister, ex-girlfriend Dawn Jones, ex-girlfriend's mother Joanne Nicholson, and a co-worker from 1992 to 1998, Precious Henderson. Their beliefs that Bell was a good father to his five children and a good employee are not new evidence. Aside from the fact that Bell himself was aware of them, Ms. Williams and Ms. Nicholson presented these same statements to the state court which assumed the allegations true. (JA 186-89, 229).

No "new" facts were presented to the federal court in the form of "expert" witnesses. (Bell's Brief at 50-51). Dr. Stejskal was not an expert witness in federal court; he was a fact witness testifying about his own mitigation investigation and assistance to trial counsel. (JA 410-67). Mr. Cooley and Dr. Cunningham presented no factual evidence at all. (JA 372-410, 757-69). Instead, the district court permitted them, over the Warden's objections, to testify about their opinions on what defense attorneys should do in capital cases. Even under Bell's theory, even denying § 2254(d) deference to a decision that did not take into account "new" mitigation evidence allegedly discovered later in federal court, and even assuming diligence in the state habeas proceeding, this is not "new." Opinions of lawyers or psychologists on the value of particular items of evidence is simply not "new evidence" of anything.

Indeed, the record establishes that the "new" facts heard by the district court were the same allegation the state court had considered and

assumed true. Bell presented no new information about which trial counsel were unaware.

3. Section 2254(d)'s language and history demonstrate its applicability to Bell's claim.

a. The language of § 2254(d) applies to Bell's claim.

Bell came to federal court claiming that trial counsel failed to investigate mitigating evidence about his background and character. He insisted that it was "exactly the same" claim he had presented to the state court. (Bell's 8/1/05 Brief in Opposition to Warden's Answer and Motion to Dismiss at 117-18). Under those circumstances, the district court was faced with a very simple menu of decisional choices.

First, federal habeas corpus is not available merely to reconsider reasonable state court judgments on the same claim. A federal habeas court is required to decide if the applicant has shown that the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). In *Terry Williams*, 529 U.S. at 413, this Court said that provision means that "the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially

indistinguishable facts." Only if the applicant demonstrates that the state court decision does not merit statutorily-mandated deference may the federal court then determine the claim *de novo*, subject, of course, to the presumption of correctness mandated by § 2254(e)(1) to be applied to any factual findings by the state court.

Second, federal habeas corpus review is not available merely to reconsider reasonable fact-finding made by state courts. The applicant must demonstrate that the state court decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). In *Terry Williams*, 529 U.S. at 413, this Court said that provision means that "the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Accord Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002) (relief only if state court applied law to facts in objectively unreasonable manner). Only if the applicant shows that the state court decision unreasonably decided the facts presented may a federal court determine the claim *de novo*.

There is no provision in § 2254, or in this Court's precedents interpreting it, that permits a federal habeas court to hold an evidentiary hearing to "see

if" the state court decision was reasonable.[22] The § 2254(d) determination is an all or nothing proposition: if not unreasonable, the claim must be dismissed; if unreasonable, the federal court may determine the claim *de novo*.

Third, if the inmate presents a truly new claim in a § 2254 proceeding that he did not present to the state court, the determination of that new claim falls outside the scope of § 2254(d), and is governed by the settled doctrine of procedural default. The inmate must demonstrate that he has "cause" for his failure to present the new claim in state court and resulting "prejudice." *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) ("The procedural default doctrine and its attendant 'cause and prejudice' standard are 'grounded in concerns of comity and federalism,' *Coleman v. Thompson*, 501 U.S. 722, 730 (1991), and

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[22] In *Valdez v. Cockrell*, 274 F.3d 941, 950-52 (5th Cir. 2001), *cert. denied*, 537 U.S. 883 (2002), the Fifth Circuit held that the AEDPA did not permit an assessment of whether the state court process was "full and fair," and that to so hold would "have the untenable result of rendering the amendments enacted by Congress a nullity." In response to the inmate's objection that the court's holding would render "impotent an evidentiary hearing held" in federal court, the Fifth Circuit found that § 2254(d) deference still is required even when a hearing has been held that is not barred by § 2254(e)(2), because such a hearing "may assist the district court in ascertaining whether the state court reached an unreasonable determination under either § 2254(d)(1) or (d)(2)." *Accord Pecoraro v. Walls*, 286 F.3d 439, 443 (7th Cir.), 537 U.S. 956 (2002); *Matheney v. Anderson*, 377 F.3d 740, 747 (7th Cir. 2004), *cert. denied*, 544 U.S. 1035 (2005).

apply alike whether the default in question occurred at trial, on appeal, or on state collateral attack, *Murray v. Carrier,* 477 U.S. 478, 490-492 (1986)"). If the applicant demonstrates "cause and prejudice" or "actual innocence," *see Schlup v. Delo*, 513 U.S. 298, 329 (1995), then the § 2254 court may consider the new claim *de novo*. If the applicant does not demonstrate these exceptions to the procedural default rule, then the § 2254 court must refuse to consider the defaulted claim.

Even if the inmate demonstrates that the state court decision was unreasonable under § 2254(d), the federal court still "shall not hold an evidentiary hearing" on newly-asserted facts unless the inmate demonstrates that he did not fail "to develop the factual basis of [the] claim in State court proceedings." 28 U.S.C. § 2254(e)(2). In *Michael Williams*, 529 U.S. at 435-36, this Court held:

> The question is not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts. The purpose of the fault component of "failed" is to ensure the prisoner undertakes his own diligent search for evidence. Diligence for purposes of the opening clause depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court. . . . Congress has given prisoners who fall within § 2254(e)(2)'s opening clause an opportunity to obtain an evidentiary hearing where the legal or

> factual basis of the claims *did not exist* at the time of state-court proceedings. (Emphasis added).

See also id. at 433 (holding that § 2254(e)(2) preserved the holding in *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8 (1992), that inmates "who are at fault for the deficiency in the state court record must satisfy a heightened standard to obtain an evidentiary hearing" and that Congress "raised the bar" by requiring non-diligent inmates to show cause under § 2254(e)(2)(A)&(B) and eliminating the freestanding innocence exception).

If the inmate successfully demonstrates unreasonableness, "cause and prejudice" and diligence under *Michael Williams*, and the federal court determines that a hearing is necessary to resolve disputed facts, the federal court obviously would have to decide the existence of new facts, credibility of new witnesses, *etc*., as a *de novo* matter, because the state court will not have considered such matters. But the district court under no circumstances may hold a hearing on a claim already decided by the state court unless the inmate demonstrates unreasonableness under § 2254(d) and, even then, the hearing may not stray from the claim or facts already presented to the state court. It is a *de novo* determination of an unreasonably decided claim. If the inmate wants the federal court to *expand* on the facts addressed by the state court in its unreasonable decision, then Congress makes it express that the federal court *may not hold a hearing*

unless the prisoner shows that (1) he was diligent but the facts did not exist when he was in state court, *see Michael Williams*, or (2) he was not diligent but has cause for his default and he is innocent. *See* § 2254(e)(2)(A)&(B).

The district court here ruled that Bell had made a "colorable claim" of unreasonableness based on its own re-analysis of the same claim and evidence already decided by the state court. It thus announced it would hold a hearing to see if the state court decision was unreasonable. (CApp. 83a). Nothing in § 2254(d) permitted such review of the state court's decision.

b. The legislative history of § 2254(d) demonstrates that it was intended to apply to Bell's claim.

In *Wright v. West*, 505 U.S. 277, 284 (1992), this Court *sua sponte* directed the parties to address the issue of deference versus a *de novo* standard of review. The Court was split over the issue. Justice O'Connor expressly noted, in her concurring opinion joined by three Justices, that Congress had grappled with the issue but had been unable to decide whether the standard of review should be changed from *de novo* to deference to reasonable state court decisions. *Id*. at 305.

Four years later, Congress settled the issue when it passed the AEDPA, expressly changing the standard of review of all issues, legal and mixed law

and fact alike, from *de novo* to the reasonableness standard sought by the petitioners in *West*. *See Bell v. Cone*, 535 U.S. 685, 693 (2002) (AEDPA purpose is to prevent federal retrials and ensure that state court convictions are given effect). In AEDPA, Congress also abrogated *Townsend v. Sain*'s holding about when evidentiary hearings are permitted and required in § 2254 cases. Section 2254(e)(2) now governs when a hearing can be held. It does not permit the federal court to engage in a *Townsend* "full and fair" assessment of the mechanism selected by a state legislature and employed by a state court to decide a claim. Congress jettisoned altogether the statutory exceptions to the presumption of correctness, including the prior "full and fair" factors. *See Valdez*, 274 F.3d at 949.

Amici National Association of Federal Defenders and National Association of Criminal Defense Lawyers (NAFD & NACDL) argue that federal court review is the "backstop for inadequacies of state process" and therefore that Congress must have intended in the AEDPA for federal courts to assess whether the state court proceeding was "full and fair." Brief for Amici NAFD & NACDL at 27. Relying on congressional debates of pre-1996 bills, they posit that Congress simply re-described the standard as one of "reasonableness" in order to trick those opposed to "full and fair" into voting for it. *Id*. at 18-20.

There is no rule of statutory construction which supports Amici's hidden treasure theory.[23] Congress expressly rejected the "full and fair" standard and rejected imposing an obligation on federal courts to assess state court proceedings for fullness and fairness. If Congress secretly intended to smuggle a "full and fair" standard back into § 2254(d), after expressly rejecting it, it has kept that secret well. In fact, the "full and fair" standard was rejected because members of Congress saw it as an almost complete elimination of federal habeas review, just as that standard had curtailed Fourth Amendment claims after *Stone v. Powell*, 428 U.S. 465 (1976), was decided. *See generally,* 141 Cong. Rec. S. 7833 *et seq.* (debating Kyl amendment to require "full and fair" standard). Senator Kyl's amendment was rejected on June 7, 1995. S. Amdt. 1211 to S. 735, S. Roll Call 240. Senator Biden's amendment to delete the standard of deference to state courts likewise failed on the same day. S. Amdt. 1224 to S. 735, S. Roll Call 241. Bell's amici simply misstate the legislative history, preferring instead to rely on the views of agenda-driven habeas commentators and congressional members whose proposals to maintain *de novo* review ultimately were rejected by Congress.

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[23] It also is contrary to Congress' intent to codify this Court's holding that "[t]his argument is premised on a skepticism of state courts that we decline to endorse. State courts are co-equal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution." *Sawyer v. Smith*, 497 U.S. 227, 241 (1990).

c. Bell's theory of statutory construction is without merit.

Bell mistakenly relies on *Michael Williams* simply because this Court there permitted a federal hearing and *de novo* review. In *Michael Williams*, the petitioner could not be faulted for failing to develop his juror misconduct claims in state court because he established that prosecutorial misconduct denied him the very evidence upon which his new claims were based. 529 U.S. at 440-41. This Court held that the "underdevelopment of these matters was attributable" to the juror and the prosecutor alone and that Williams thus could not have "failed to develop" the evidence in state court because he could not have known about it. *Id*. at 443-44. The Court's interpretation of § 2254(e)(2), rejecting a no-fault reading of "failed to develop," was necessary to avoid a "harsh reading, which would attribute to Congress a purpose or design to bar evidentiary hearings for diligent prisoners with meritorious claims just because the prosecution's conduct went undetected in state court." *Id*. at 434-35.

Bell's case simply does not fit into *Michael Williams*. Michael Williams was entitled to a hearing and *de novo* review in federal court on a claim that he could not, as a matter of fact, have found earlier due to prosecutorial misconduct. The same cannot be said about a claim that counsel failed to investigate petitioner's ex-wife, ex-girlfriends and friends who always were known to the petitioner. Therefore, there is no comparison to evidence withheld by a

prosecutor. *See Michael Williams*, 529 U.S. at 437-38 (finding no diligence in developing a *Brady* claim that a co-defendant's psychiatric report had been withheld because petitioner had the report during his state habeas case but did not present it to the state court).

Apart from *Michael Williams*, Bell only relies on several lower court decisions which have ruled similarly to *Michael Williams* that, when the new claims have involved extrinsic roadblocks to the petitioners' development of the claims in state court, § 2254(e)(2) will not bar factual development in federal court.[24] *See Monroe*, 323 F.3d at 297-99; *Joseph v. Coyle*, 469 F.3d 441, 469 (6th Cir. 2006); *Killian v. Poole*, 282 F.3d 1204, 1207-08 (9th Cir. 2002).[25] Indeed, the courts which have held that the AEDPA deference standard applies to state court adjudications regardless of whether the federal court has held a hearing, have pointed out that it is only in

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[24] Contrary to Bell's contention, *Holland v. Jackson*, 542 U.S. 649 (2004) (*per curiam*), did not hold that *de novo* review was required for new facts developed on an old claim; rather, it assumed "*arguendo*," that if *de novo* review ever would be appropriate for such new facts, it would not be appropriate where the inmate had not been diligent under § 2254(e)(2). 542 U.S. at 653.

[25] Bell also relies on *Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003), as a case applying the *Michael Williams* rule to a claim of *Strickland* ineffectiveness. (Bell's Brief at 25). He is wrong. The court determined that the state court's defaults of *Strickland* claims were not adequate and independent and thus the federal court had no merits decisions to which it could defer. 317 F.3d at 1212.

the *Brady*, or similar prosecutorial misconduct, context where the federal courts have held that *de novo* review is appropriate. *See Valdez*, 274 F.3d at 950-52; *Pecoraro*, 286 F.3d at 443; *Matheney*, 377 F.3d at 747.

Bell confusingly argues that only his adaptation of § 2254(d) can empower a federal court to give effect to evidence which will be developed in a federal hearing. (Bell's Brief at 34). If Bell means to say that a federal court may not consider new factual development when deciding whether the state court decision was reasonable, then he is correct. Congress intended that such factual development as practiced in the past must cease. *See Miller-El v. Cockrell*, 537 U.S. 322, 337 (2005) (Congress placed more, rather than fewer, restrictions on the power of the federal courts to grant writs). But Congress also saw no reason for the federal courts to defer to *unreasonable* state court decisions and thus permitted *de novo* review of claims so decided.

Bell clearly sees some independent grant of authority in § 2254(e)(1) and (2) to hold a hearing, but it is not there.[26] Congress did not intend for those statutes to swallow its intent in § 2254(d) that constitutionally reasonable state court decisions be left alone. Section 2254(e)(2) is an express, categorical

[26] Amicus Former State Court Judges likewise mistakenly sees § 2254(e) as supplanting § 2254(d)'s standard of review instead of as the express bar to review which it clearly is. Brief for Amicus Former Judges at 5-6.

bar to a hearing unless its narrow exceptions are met. *Michael Williams* did not expand that statutory mandate, but rather made clear that the statutory bar would not apply to the specific circumstances of that case.[27]

Bell must not have thought his "new claim" theory through. If Bell is correct, and his claim is "new," then it is defaulted and may not be considered by the federal courts because it never was presented to the state court. *See Gray v. Netherland*, 518 U.S. 152, 162 (1996). In his discussion, he simply ignores "cause and prejudice" for that default. And, indeed, he never could demonstrate those prerequisites to federal court review because *nothing* prevented him from presenting the state court with all of the "new" evidence he now says he presented to the federal court.

Finally, Bell's "policy interests" argument must be seen for what it is: a request that this Court rewrite the statute. Bell says that Congress' deference standard can work only if the state and federal records are "substantially the same" and, preferably, "identical." He openly argues that the Court's decision in *Michael Williams* should be extended to cover any and all claims, and to equate a state court's *inability* to consider certain facts,

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[27] Bell says the Fourth Circuit held that "habeas corpus . . . *shall not* [ever] be granted" based on § 2254(e)-developed facts. (Bell's Brief at 34). However, he wisely includes no citation to the court's opinion for his imaginary "quote."

because the petitioner chose not to present them, with the *Michael Williams* finding that the petitioner did not fail to develop them. (Bell's Brief at 36-38).

This Court should be aware of the ramifications of Bell's request, and of his assertion that what he seeks is a "rare" event. Habeas petitioners, capital and non-capital alike, have *no* interest whatsoever in having a federal court apply the statutory deference standard to their claims. If this Court holds – particularly under the facts of this case involving a plain error by the federal court in holding a hearing – that whenever a federal court holds an evidentiary hearing the claim is removed from Congress' mandate for deferential review, that holding will give the green light to all sorts of gamesmanship. It will signal that all petitioners need do to avoid deference is allege a few more facts in their federal petition and seek a hearing by claiming that they were prevented from developing those facts in the state court by a summary dismissal, a filing deadline, a page limit, a denial of discovery or experts, or a host of other excuses creative petitioners will find for faulting the state court.

4. Bell was not diligent in state court and thus no hearing should have been held.

The Warden has argued consistently that no hearing was authorized.[28] The district court held a

[28] The Warden filed a motion to dismiss, asserting that § 2254(d) required dismissal and that no evidentiary hearing

(Continued on following page)

hearing to "see if" the state court was reasonable, but that purpose was not authorized by § 2254. Nearly all of what Bell presented to the federal court was the same thing he presented to the state court. The federal court simply held a hearing on the same evidence and re-decided the same matters, albeit differently on the *Strickland* performance prong. This process was no part of § 2254(d).

The few additional witnesses Bell presented in the federal hearing were friends or family who always were available to petitioner. Bell presented them all to the federal court with no more assistance from the federal court than he had received from the state court. He received no funding from the federal court until *after it had considered his claims and granted a hearing*. And, even then, the federal court denied funding for a "mitigation specialist." Dr. Stejskal was Bell's own trial expert. Bell obtained no federal court assistance in securing Mr. Cooley, Ms. Albarus, and Dr. Cunningham. Indeed, none of his supposed new

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was permitted in this case. She filed a motion for summary judgment after the district court ordered the hearing, again asserting that § 2254(d) required dismissal. Almost her entire argument in the Fourth Circuit was devoted to the error committed by the district court. But the Warden was the *prevailing party* below. The Fourth Circuit elected not to address the district court's error based on the obvious lack of prejudice. The Warden did not have to complain in her brief in opposition about the district court's error because Bell did not make in his certiorari petition the same argument he presents now. The Warden always has contested the district court's decision to hold a hearing and the record flatly refutes Bell's contrary assertion.

evidence was alleged or presented with any assistance he did not already have when he was in state court. Every part of Bell's federal claim existed legally and factually in exactly the same form and exactly as was available to Bell in state court. Bell not only was not diligent in state court under § 2254(e)(2), *see Holland*, 542 U.S. at 653, but his "new" evidence would not have survived even the out-dated "deliberate by-pass" standard of *Fay v. Noia*, 372 U.S. 391 (1963).

The clearest example of why the district court never should have held a hearing comes from *Strickland* itself. In *Strickland*, the trial attorney actively had prepared for the guilt phase of the capital murder trial but became despondent once he learned his client, Washington, had confessed. Washington pleaded guilty and his counsel prepared only minimally for sentencing, talking only to his client and to his client's mother and wife on the telephone, "though he did not follow up on the one unsuccessful effort to meet with them" or "otherwise seek out character witnesses." 466 U.S. at 672-73. Counsel did not request any mental health expert assistance and "did not look further for evidence concerning [Washington's] character and emotional state." *Id*. at 673. Counsel stopped his investigation due to his "hopelessness about overcoming the evidentiary effect of respondent's confessions to the gruesome crimes." He put on no evidence. The trial judge found the existence of numerous aggravating

factors and *found no mitigating evidence in existence*. *Id*. at 675.

In his state post-conviction petition, just as in Bell's case, Washington claimed ineffective assistance at sentencing: his trial counsel did not investigate, obtain a psychiatric evaluation, find and present character witnesses, *etc*. He presented affidavits from fourteen friends and family who said they would have testified for him if asked and two mental health evaluations from experts. Just as in Bell's case, the state court denied the claims without an evidentiary hearing, specifically finding that counsel's conduct was neither deficient nor prejudicial and that the affidavits "showed nothing more than that certain persons would have testified that [Washington] was basically a good person. . . ." 466 U.S. at 675-76.

Just as in Bell's case, the federal district court held a hearing on Washington's claims, after which that court found, just as in Bell's case, that trial counsel should have investigated further but that that failure did not prejudice the defense. 466 U.S. at 678-79. The Eleventh Circuit reversed, but this Court found that counsel reasonably restricted evidence about Washington's character so that harmful character and psychological evidence and criminal history would not come in. It found that, given the "overwhelming aggravating factors," there was no reasonable probability that the omitted evidence would have changed the death sentence. 466 U.S. at 699-700. This Court resolved the issue "without regard to the evidence presented at the District Court

hearing" and found that the "state courts properly concluded that the ineffectiveness claim was meritless *without holding an evidentiary hearing*." 466 U.S. at 700 (emphasis added). *See also Schriro v. Landrigan*, 127 S.Ct. 1933, 1940-42 (2007) (dismissal without federal hearing appropriate where no *Strickland* prejudice).

While not dispositive of the § 2254 issue in Bell's case, *Strickland* shows beyond any doubt that the Virginia Supreme Court's decision was reasonable and that the district court never should have gone further.[29] To the extent the Fourth Circuit erred, it was in even considering Bell's hearing evidence instead of holding that the district court should not have held a hearing and should have dismissed under § 2254(d). Bell, however, cannot complain that the Fourth Circuit actually considered his evidence and

[29] *Strickland* also demonstrates that the state court's decision on the performance prong was not unreasonable. Counsel interviewed their client, his family, friends and an ex-girlfriend, and obtained a mitigation expert who performed his own thorough investigation. They knew about Bell's background and formulated a reasonable sentencing strategy to minimize disclosure of more prejudicial information showing Bell abandoned his wife, engaged in adulterous affairs, fathered illegitimate children for whom he provided no financial support, and beat his girlfriends. *See Cagle v. Branker*, 520 F.3d 320, 327-28 (4th Cir. 2008) (claiming ineffectiveness for presenting cross-purpose evidence); *Truesdale v. Moore*, 142 F.3d 749, 754-55 (4th Cir.) (claiming ineffectiveness for not presenting cross-purpose evidence), *cert. denied*, 525 U.S. 951 (1998). They reasonably avoided taking inconsistent positions. *See Florida v. Nixon*, 543 U.S. 175, 192 (2004).

determined his claim before agreeing that the state court's decision was not unreasonable.

5. Under any standard, Bell demonstrated no prejudice.

Bell gunned down a police officer, a "fallen hero" (JA 646), in a small town plagued by drug dealers. He had no justification except his own selfish desire not to get caught with a gun and illegal drugs, utter disregard for the sanctity of human life, and disdain for police officers. He beat his girlfriends, dealt drugs, and threatened law enforcement. He carried a gun and used it to intimidate. He bragged about killing Officer Timbrook. Just as in *Landrigan*, 127 S.Ct. at 1943-44, no weak mitigation evidence about Bell's background growing up in Jamaica years before he came to the United States and took up his life of crime, or about his affection for children he fathered but did not support, would have made a difference.

All eleven judges found the weakness of Bell's cross-purpose evidence. The Virginia Supreme Court unanimously found it *de novo*. (JA 229-30). The district court found it *de novo*. (JA 803). The Fourth Circuit found "that counsel's performance did not prejudice Bell" and then engaged in a discussion of the evidence showing why there was no prejudice. (CApp. 11a, 14a-17a).

Bell's case is a particularly poor vehicle for the rule Bell presses. No matter what the standard is, Bell cannot meet it. There simply is no probability, let

alone a reasonable one, that any jury hearing all the evidence, both that presented at trial and that Bell presented to the federal court, would not have sentenced Bell to death.

6. Bell's last argument should not be considered.

Bell argues that *Panetti v. Quarterman*, 127 S.Ct. 2842 (2007), required the state habeas court to decide his ineffective assistance claim in an evidentiary hearing. Bell did not present this argument below or in his question presented upon which certiorari was granted. It therefore should not be considered now. *See* U.S. Sup. Ct. Rule 14(1)(a); *Yee*, 503 U.S. at 535-38.

Panetti governs the specific issue of a claim of incompetence to be executed which this Court has treated differently from all other collateral claims, and which is not implicated in Bell's case. Moreover, nothing about the Virginia Supreme Court's habeas decision-making in Bell's case was unfair. Bell was given two court-appointed, capital-qualified, habeas attorneys and a statutory period of not less than 120 days to file a petition. He had his own investigator who also was a lawyer. The Virginia Supreme Court considered all the evidence Bell presented and assumed it all true. Its decision applying this Court's governing precedents to the claims and evidence presented was not rendered unfair simply because

the state court decided the issue on a motion to dismiss.

Coleman, 501 U.S. at 755-57, made clear that the federal courts may not assess the constitutionality of habeas counsel's effectiveness because the Constitution does not require a state court even to provide habeas corpus review. If this Court were to constitutionalize collateral proceedings, then there literally could be no finality to state court criminal judgments. *See Evitts v. Lucey*, 469 U.S. 387, 411 (1985) (Rehnquist, J., dissenting) ("Now lawfully convicted criminals who have no meritorious bases for attacking the conduct of their trials will be able to tie up the courts with habeas petitions alleging defective performance by appellate counsel. The result is akin to the effect created when a mirror is held facing another mirror, the image repeating itself to infinity."). This Court never has found that the Constitution extends to such matters as Bell proposes.

In *Michael Williams*, 529 U.S. at 442-43, the Court held that "[w]e do not suggest the State has an obligation to pay for investigation of as yet undeveloped [habeas] claims." The Court certainly never has suggested that a state court must employ a specific procedure, or hold a hearing, on a claim of ineffective assistance of counsel, and nothing in the Constitution would require such intrusion into a State's collateral review processes. The Court should not consider the sea change Bell seeks.

CONCLUSION

The Court should affirm the judgment of the Fourth Circuit.

Respectfully submitted,

Loretta K. Kelly, Warden,
Sussex I State Prison,
Respondent herein.

ROBERT F. MCDONNELL
Attorney General of Virginia

JERRY P. SLONAKER
Senior Assistant Attorney General

KATHERINE B. BURNETT
Senior Assistant Attorney General
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804)786-9642
(804)786-0142 (fax)